No. 87-34

IN THE

Supreme Court of the United States

OCTOBER TERM, 1987

FERDINAND E. MARCOS

and

IMELDA R. MARCOS,

Petitioners,

v.

UNITED STATES OF AMERICA,

Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Fourth Circuit

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PETITIONERS' REPLY BRIEF

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PETITIONERS' REPLY BRIEF

Petitioners Ferdinand E. Marcos and Imelda R. Marcos hereby submit their reply to the opposition brief filed by the United States on September 4, 1987.

ARGUMENT

I. THE CONFUSION IN THE GOVERNMENT'S ANALYSIS OF HEAD OF STATE IMMUNITY DEMONSTRATES THE NEED FOR CONSIDERATION OF THE ISSUE BY THIS COURT

The United States contends that the court below was correct in giving effect to the "waiver" of Petitioners' immunity by the current Philippine government. The confusion in the Government's analysis is so pronounced, however, that it not only demonstrates why this position is incorrect, but also suggests why the issue requires prompt review by this Court.

The most fundamental flaw in the Government's argument is its collapse of the head of state immunity doctrine into the immunity of foreign states and state entities, which is governed by the Foreign Sovereign Immunities Act of 1976 ("FSIA"), 28 U.S.C. §§ 1602-1611. *See* Brief For The United States In Opposition ("Opp.") at 5-7. The two doctrines, head of state and state immunity, are separate legal concepts, which have separate histories and are governed by separate law. *See generally* Note, *Resolving The Confusion Over Head of State Immunity: The Defined Rights of Kings* 86 Colum. L. Rev. 169, 171 (1986) ("despite their common origins, head of state immunity and sovereign immunity have evolved into separate legal constructs"). Unlike foreign state immunity, head of state immunity is a doctrine of customary international law, and is not governed by the Foreign Sovereign Immunities Act. *See Republic of the Philippines v. Marcos*, Misc. No. 86-706 (WHO) (N.D. Cal. Feb. 11, 1987), Civ. Nos. 86-0213, 86-0155 (D. Hawaii) ("[a]lthough head-of-state immunity has its origins in sovereign immunity, arising

in a period when the head of state and the state itself were considered one, the doctrine is now independent of sovereign immunity and guided by separate principles"); *Domingo v. Marcos*, Civ. No. C82-1055V (W.D. Wash. July 14, 1983) (order affirming United States' argument that head of state immunity is not governed by the FSIA, which eliminated State Department suggestion mechanism); *Kilroy v. Windsor (Prince Charles, The Prince of Wales)*, No. C-78-291 (N.D. Ohio Dec. 7, 1978) (same).[1]

The Government's confusion on this point leads it to reject the notion that part of the underlying purpose of head of state immunity is to insulate foreign leaders from the threat of being subjected to the jurisdiction of foreign courts, an operation that serves to protect the proper functioning of governments. *See* Pet. at 14; Opp. at 6 n.7.

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[1] This proposition was reconfirmed as recently as six weeks ago in a case involving President Mohammed Hosni Mubarak of Egypt. Application For Trustee To Abandon Claims To The Benefit Of Debtor, *In Re Edwin Paul Wilson*, Case No. 84-01415-A (Bankr. E.D. Va. June 18, 1987). There ex-CIA agent Edwin Wilson applied to bankruptcy court for permission to pursue claims against President Mubarak and others arising out of arms sales to Egypt effected pursuant to the 1979 Camp David Accords, at a time when Mubarak was Vice President of Egypt. On August 5, 1987, the United States filed a Suggestion of Immunity on behalf of President Mubarak (and another high-ranking Egyptian official), citing the doctrine of head of state immunity. (For the convenience of the Court, a copy of the August 5, 1987 Suggestion of Immunity is reproduced in the Appendix hereto at 1a.) Because the proposed complaint involved a contract dispute, the action would fall within the "commercial activity" exception to the FSIA, 28 U.S.C. § 1605(a)(2), if it were brought against a foreign state, so that the foreign state would not enjoy immunity. *See Verlinden B.V. v. Central Bank of Nigeria*, 461 U.S. 480 (1983). In the case of President Mubarak, where the action is directed not to a foreign state but to a head of state, the FSIA's commercial activity exception does not apply. *Accord, Domingo v. Marcos*, No. C82-1055V (W.D. Wash. July 14, 1983) (dismissal of then-President Marcos and his wife in wrongful death action falling within the "tort exception" to the FSIA, 28 U.S.C. § 1605(a)(5): to date, the Republic of the Philippines remains a defendant in this suit).

Relying on the state immunity doctrine, the Government argues that sovereign immunity is founded "solely on notions of comity," and concludes thus that the principle of shielding government officials, long established in domestic law, *Spalding v. Vilas*, 161 U.S. 483, 498 (1896), *Nixon v. Fitzgerald*, 457 U.S. 731, 745 (1982), plays no part in the head of state doctrine. *Id.* While there may be some merit to this argument when it is applied to a legal abstraction such as a foreign state, the same can not be said in the case of a head of state (or other government official) who is able to feel the serious chilling effect of potential litigation. Indeed, this principle has been recognized in State Department Suggestions of Immunity as part of the underlying rationale for the head of state immunity doctrine. Letter of Abraham D. Soafer, Legal Advisor, State Department, dated July 30, 1987, *In Re Edwin Paul Wilson*, Case No. 84-01415-A (Bankr. E.D. Va. 1987) ("[a] central purpose of the immunities involved in this matter is the interest in preventing improper suits against certain classes of foreign officials, to prevent harassment and interference with the performance of their duties") (*see* 11a, *infra*); Letter of Monroe Leigh, Legal Advisor, State Department, dated Sept. 26, 1975), *Psinakis v. Marcos*, No. C-75-1725 (N.D. Cal.), 1975 Dig. U.S. Prac. Int'l L. 344, 345 ("[i]t may be that the basis for a Head of State immunity . . . [is] that a Head of State performs important functions which should not be interfered with by the necessity of defending litigation in foreign countries"). When the protective role played by head of state immunity is properly understood, it becomes evident that the doctrine would be eviscerated by acceptance of the power of successor governments to waive the immunity of their former leaders, especially where there is political hostility between them.

The failure to focus on the singular role played by heads of state underlies another of the basic flaws in the Government's brief. The United States contends that, because governments have the power to waive the im-

munity of the state and of diplomats,[2] governments also should have the power to waive the immunity of their former heads of state. This argument ignores the fact that heads of state have unique policy-making responsibilities that neither states nor diplomats possess. A state itself, as a legal abstraction, does not perform a decision-making function, while the role of a diplomat typically is limited to the execution of his or her government's policy, not its formulation. A head of state, on the other hand, operates on an entirely different order of governmental responsibilities. The unique functions of a head of state require the protection of an international immunity.

Finally, though there are other errors,[3] the Government's brief also reflects a basic misunderstanding of the application of domestic law to interpretation of the head of state doctrine. Under U.S. law, the immunity of a U.S.

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[2] The Government cites no authority, and we find none, in support of the proposition that a government can waive the immunity of its former (as opposed to active) diplomats.

[3] Among the more obvious is the assertion that the immunity enjoyed by President Marcos does not extend to his wife, Imelda R. Marcos. Opp. at 5 n.5. Under customary international law, head of state immunity extends to the spouse of the head of state. RESTATEMENT (SECOND) OF FOREIGN RELATIONS LAW § 66. Indeed, based on a State Department Suggestion of Immunity, head of state immunity previously was extended to Mrs. Marcos. Letter of James H. Michel, Acting Legal Advisor, State Department, dated Dec. 2, 1982, *Domingo v. Marcos*, No. C82-1055V (W.D. Wash. filed Sept. 14, 1982), ("Mrs. Marcos is a member of the immediate family of President Marcos and, therefore, partakes of his immunity").

The United States also errs in its attempts to deflect the impact of the domestic cases establishing the immunity of U.S. Presidents on the instant case. *Nixon v. Fitzgerald*, 457 U.S. at 731; *Nixon v. Administrator of General Services*, 433 U.S. 425 (1977). *See* Opp. at 9. The Government seeks to distinguish these cases on the ground that the scope of U.S. Presidential immunity does not encompass the facts of this case. The *scope* of immunity, however, is entirely irrelevant to the issue here, which is whether the immunity, whatever its scope, can be waived by a successor government.

President is possessed by the President himself, *Nixon v. Fitzgerald*, 457 U.S. at 731, and as such cannot be waived by an incumbent president. *Cf. Nixon v. Administrator of General Services*, 433 U.S. 425, 449 (1977); U.S. Department of Justice, Office of Legal Counsel, Re: Nixon Paper Regulations (Memorandum of February 18, 1986) ("we believe that it would be inconsistent with the rationale underlying the former President's privilege for the incumbent to sit as judge of the validity of a predecessor's claim"). *See also* Pet. at 11-13. Nonetheless, the Government argues that the court should accept the Philippine government's waiver of Petitioners' immunity because this would establish as a principle of international law the proposition that the United States government is empowered to decide "whether former United States Presidents are to be granted immunity." Opp. at 8. Acceptance of this principle, however, would require the rejection of the policy articulated in the above-cited decisions of this Court, which place the assertion of privileges and immunities of U.S. Presidents beyond the reach of their successors.

The Government's brief thus exhibits a number of basic misunderstandings regarding the proper interpretation of the head of state immunity doctrine. This confusion reflects a wider uncertainty, shared by courts, commentators, and no doubt by members of the international community, about the manner in which the head of state doctrine is to be interpreted in the United States. This state of affairs has been fostered, at least in part, by this Court's failure to rule in this area, and is exacerbated by the fact that the FSIA is silent as to the immunity of heads of state.[4] Accordingly, because of the

[4] Unlike the FSIA, sovereign immunity statutes recently passed by a number of other countries expressly encompass the immunities of heads of state. State Immunity Act of 1978, 26 & 27 Eliz. 2, ch. 33, *reprinted in* 17 I.L.M. 1123 (1978) (British); Act to Provide for State Immunity in Canadian Courts, 1982, 29, 30 & 31 Eliz. 2, ch. 95, *reprinted in* 21 I.L.M. 798 (1982) (Canadian); Foreign States Immunities Act 1985, Act of Australian Parliament No. 196 (Dec. 16, 1985) (Australian).

significance this issue holds for the conduct of foreign relations, reviewed by this Court is imperative.

II. THE UNITED STATES HAS NOT SHOWN THAT THE EXECUTIVE HAS THE POWER TO BY-PASS AN ACT OF CONGRESS THROUGH THE USE OF A SOLE EXECUTIVE AGREEMENT

The United States argues that Petitioners are not entitled to assert the privilege against self-incrimination under the Philippine Constitution based on 28 U.S.C. § 1782 because this statute "is wholly inapplicable to this case." Opp. at 10. The Government appears to be arguing that § 1782 would apply only if the federal grand jury were a "sham" or a "tool of the Philippine government." *Id.* at 11. This argument completely misses the point.

Despite the Government's suggestion to the contrary, Petitioners do not claim that the existence of the Mutual Assistance Agreement renders the federal grand jury investigation a "sham" or that the grand jury is nothing more than a "tool of the Philippine government." Opp. at 11. The grand jury is, however, investigating allegations of kickbacks paid in connection with arms contracts with the Philippines, which are the subject of a parallel criminal investigation in the Philippines. The two investigations are linked through the Mutual Assistance Agreement, which obligates each government to share evidence bearing on the subject matters of the investigations. The Government still does not dispute the fact that the U.S. will be under a legal obligation to provide the Philippine government with copies of any documents produced by Petitioners to the grand jury, which will entail seeking a court order to remove the Rule 6(e) constraints on the dissemination of these documents. Transmission of the documents at the Philippines' request through the mechanism of the Mutual Assistance Agreement will be "assistance to a foreign tribunal" within the meaning of § 1782, except that in this context it will be without the benefit of the protections guaranteed by this statute. For the reasons stated in the petition for

certiorari, this use of the Mutual Assistance Agreement to by-pass existing legislation is an unconstitutional abrogation of Congressional powers by the Executive. Pet. at 15-18. Because of the growing reliance on the use of Mutual Assistance Agreements in the area of international law enforcement, prompt consideration and correction of the Circuit Court's decision on this issue is required.

III. THE UNITED STATES HAS NOT SHOWN WHY THE COURT SHOULD DECLINE TO HEAR THE FIFTH AMENDMENT ARGUMENT

The United States contends that Petitioners are not entitled to assert their Fifth Amendment privilege against self-incrimination based on fear of foreign prosecution because (a) Petitioners do not face a substantial risk of prosecution in the Philippines, and (b) the Fourth Circuit's ruling on the Fifth Amendment question does not warrant review by this Court. Opp. at 11-16. The Government's arguments are specious.

The Fourth Circuit's finding of a substantial risk of prosecution in *United States v. Under Seal (Araneta)*, 794 F.2d 920 (4th Cir.), *cert. denied*, 107 S.Ct. 331 (1986) to the contrary notwithstanding, the United States argues that Petitioners do not face a substantial risk of ever returning to the Philippines. Opp. at 12-13. The Government asserts that it has "no present intention" of returning Petitioners to the Philippines and notes, *inter alia*, that the Immigration and Naturalization Service recently restricted President Marcos to the Island of Oahu. *Id.* This does nothing to contravene the fact that the United States exercises absolute control over Petitioners' physical location at the present juncture, and that future decisions regarding Petitioners' return to the Philippines will be made by the United States at its sole discretion based on a political evaluation of the appropriateness of such action at the time. Though the U.S. may have "no present intention" of returning Petitioners to the Philippines, we need not labor

the point that the intentions of the Executive are subject to precipitous change. Indeed, though many factors may influence a decision to return Petitioners to the Philippines, a recent decision by the Swiss Supreme Court may play a prominent role in this regard. On July 1, 1987, the Swiss Court ruled that information regarding Swiss bank accounts allegedly owned by President Marcos will not be released to the Philippine government unless and until the Swiss courts are satisfied that President Marcos is accorded certain due process rights in connection with the Philippine criminal proceedings, which may require that President Marcos physically be present in the Philippines to face the charges against him. *Petition for Assistance of the Republic of the Philippines*, Appeal Nos. A117, A123, A125 (BGE I July 1, 1987).

With respect to the Fifth Amendment issue, the Government claims that the Fourth Circuit's decision in *Araneta*, affirmed below in the instant case, does not conflict with this Court's decision in *Murphy v. Waterfront Comm'n*, 378 U.S. 52 (1964). As the sole basis for its claim, the Government asserts that:

> the Court in *Murphy* carefully distinguished that case from the federal-state case before it (378 U.S. at 67); as the Court's discussion indicated (*id.* at 67-68), there are differences between the two cases that would justify *not* extending the privilege to protect against incrimination in a foreign prosecution.

Opp. at 15 (original emphasis). In light of the Government's argument, we have revisited the *Murphy* decision, but we find nothing in the case to support the Government's claim that *Murphy* distinguishes federal-state cases from the facts of the instant case. Indeed, in the pages cited by the Government (67,68) the Court distinguishes two factors used as a basis of decision in a case *rejected* by the Court as a correct articulation of the English rule, which, according to the *Murphy* Court, is properly understood to be that the privilege against self-incrimination can rest on fear of prosecution in a

foreign country. *Id.* at 61-63. In other words, the Court in these pages is showing why the reasoning that would lead to the opposite conclusion is flawed; there is nothing in these passages or elsewhere in the opinion to suggest any retreat from the Court's broad acceptance of the English rule.

As noted in our petition, the Fifth Amendment question has been raised many times in the fifteen years since this Court first voted to consider the question in *Zicarelli v. New Jersey State Commission of Investigation*, 406 U.S. 472 (1972). After the petition was filed, the issue appeared once again in a reported decision, this time in a case before the Court of Appeals for the District of Columbia Circuit, *In re Sealed Case*, No. 87-5208, slip op. (D.C. August 7, 1987).[5] Because there is a clear conflict between the Fourth Circuit's opinions and this Court's decision in *Murphy*, the continued proliferation of these cases mandates immediate review by this Court.

IV. THE GOVERNMENT FAILS TO ADDRESS THE JOINT VENTURE ISSUE

The Government declines to address the conflict between the joint venture standard articulated in *Araneta* and the standard established by this Court in *Byars v. United States*, 273 U.S. 28 (1927) and *Lustig v. United States*, 338 U.S. 74 (1949). Instead, the Government labels these cases "irrelevant," arguing cryptically that "[n]either case purports to impose a rule of exclusion for a foreign court." Opp. at 15 n.15.

If there is an argument here, we fail to understand it. The Government has simply declined to consider the impact of the reasoning of *Byars* and *Lustig*, which held that any official involvement by the federal government in non-federal activity *constitutionalizes* the non-federal activity. In the instant context, a finding of a joint ven-

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[5] In a *per curiam* opinion, the three-judge panel (Wald, Mikva, Bork) did not reach the constitutional issue, holding that appellant did not face a real danger of foreign prosecution.

ture between the U.S. and Philippine governments would eliminate the basis for the Fourth Circuit's holding in *Araneta*, which is that the Fifth Amendment is not available to President Marcos' daughter and son-in-law because the U.S. Constitution does not extend to the Philippine government. As the Fourth Circuit correctly noted in *Araneta*, however, this reasoning would be vitiated by a finding that the U.S. and Philippine governments are engaged in a joint venture, constitutionalizing the Philippine prosecution. As such, the framework of the Fourth Circuit's analysis is correct; the court erred only in its articulation of the standard for finding a joint venture. *Byars* and *Lustig* establish that a joint venture exists if there is any official participation of the U.S. government in the Philippine prosecution, which is contrary to the Fourth Circuit's statement that a joint venture exists only if it can be shown that the U.S. "inspired, instigated or controls" the Philippine actions. Because this issue will have an important impact on the future of U.S. cooperation with the law enforcement activities of foreign governments, it requires prompt review by this Court.

CONCLUSION

For these reasons, a writ of certiorari should issue to review the order and judgment of the Court of Appeals for the Fourth Circuit.

Respectfully submitted,

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Dated: September 18, 1987

APPENDIX

APPENDIX

UNITED STATES BANKRUPTCY COURT
EASTERN DISTRICT OF VIRGINIA
ALEXANDRIA DIVISION

Case No. 84-01415-A

IN the MATTER of
EDWIN PAUL WILSON,
Debtor.

[Filed Aug. 5, 1987]

SUGGESTION OF IMMUNITY BY THE UNITED STATES IN RESPONSE TO DEBTOR'S APPLICATION FOR TRUSTEE TO ABANDON CLAIMS TO DEBTOR'S BENEFIT

The Attorney General of the United States, through his undersigned attorneys, pursuant to Section 517, Title 28 of the United States Code, respectfully informs this Honorable Court of the diplomatic interest of the United States in the pending application of the debtor for the abandonment of certain claims to his benefit and permission to file suit, and suggests to the Court the immunity from that suit of Mohammed Hosni Mubarak, President of the Arab Republic of Egypt, and Field Marshal Mohammed Abdel Halim Abu Ghazala, Deputy Prime Minister and Minister of Defense and Military Production of the Arab Republic of Egypt.[1] In further-

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[1] The United States, through the Attorney General, submits this Suggestion of Immunity in its capacity both as a creditor and as an interested party.

ance of its suggestion of immunity, the government respectfully requests that this Court not permit debtor's proposed complaint to go forward unless it deletes these two officials as proposed defendants. In support of this suggestion of immunity and requested disposition of debtor's application, the United States respectfully submits the following:

1. Edwin Paul Wilson, the debtor in this proceeding, has applied to the Court for an order instructing the trustee to abandon certain claims to his benefit arising from an alleged contractual arrangement with certain individuals to ship military equipment to Egypt. Prospective defendants include President Mubarak and Deputy Prime Minister Abu Ghazala.[2] At the time of events alleged in the proposed complaint, President Mubarak was Vice President of the Arab Republic of Egypt, and Deputy Prime Minister Abu Ghazala was the accredited Defense Attache to the Egyptian Embassy in Washington.

2. The United States has an interest and concern in the subject matter and outcome of the debtor's application not only because it is a creditor but, more importantly, because it involves the question of immunity of the head of state and diplomatic representative of a friendly foreign State from the jurisdiction of a federal court. This interest arises from a determination by the Executive Branch, in the implementation of its foreign policy and in the conduct of its international relations, that permitting the proposed suit to go forward against Egyptian President Murbarak and Deputy Prime Minister Abu Ghazala would be incompatible with this country's foreign policy interests. As discussed below, such a determination must be given effect by the Court.

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[2] Remaining proposed defendants include Richard Secord, Thomas Clines, Theodore Shackley, Erich F. Von Marbod, and Hussein K. Salem. This suggestion of immunity is not directed to any of these individuals.

3. The Attorney General has been informed by the Legal Adviser of the United States Department of State that the Government of the Arab Republic of Egypt formally has requested the Government of the United States to suggest the immunity of its President and Deputy Prime Minister from the debtor's proposed suit. The Attorney General has been informed further by the Legal Adviser:

> President Mubarak is the sitting head of State of Egypt. Mohammed Abu Ghazala, the Deputy Prime Minister and Defense Minister of Egypt, was accredited as the defense attache of the Egyptian embassy to the United States at the time of the action attributed to him in the proposed complaint. The Government of Egypt is entitled to assert certain privileges and immunities based on head of State and diplomatic immunity doctrines and has formally requested that the United States Government suggest the immunity of the President and Deputy Prime Minister from such a suit. We believe that the acts alleged in the factual allegations of the complaint are covered by these doctrines. Accordingly, the Department of State requests that the Department of Justice submit to the bankruptcy court an appropriate suggestion recognizing and allowing the immunity of President Mubarak and Deputy Prime Minister Abu Ghazala, and asking that the court not permit the referenced suit to go forward unless it deletes as defendants these two officials who enjoy immunity.

July 30, 1987 letter to Richard K. Willard from Abraham D. Sofaer at page 1 (copy attached as Exhibit A).

4. Under customary rules of international law, recognized and applied in the United States, the head of a foreign government, its foreign ministers and other diplomatic representatives, and those designated by the head of state or members of his official party are immune

from the jurisdiction of United States federal and state courts. Restatement (Second), Foreign Relations Law of the United States, Sec. 66.[3] Courts in the United States consistently have accepted as conclusive the determinations of the Department of State concerning the status and immunity of foreign representatives. *Chong Boon Kim* v. *Yim Yong Shik*, Civ. No. 12565 (Cir. Ct., 1st Dir. Ha. 1963), cited at 58 Am. J. Int'l L. 186 (1964).

In the case of President Mubarak, not only is he the sitting head of State, but the matters alleged in the proposed complaint would have occurred while he was sitting Vice President. Under the Constitution of Egypt, the Vice President of Egypt assumes the powers of the president of Egypt if the President, for any reason, cannot carry our his functions. *See* Const. Art. 82 (Arab Republic of Egypt). Further, the constitutional responsibilities of the President apply to the Vice President as well. *Id.* at Art. 139.

With respect to Deputy Prime Minister Abu Ghazala, he is currently Deputy Prime Minister of Egypt. Moreover, he was accredited defense attache to the Egyptian Embassy in Washington, during pertinent alleged events, entitling him to diplomatic immunity. Under the Vienna Convention on Diplomatic Relations, codified in the Diplomatic Relations Act, 22 U.S.C. 254a *et seq.*, immunity maintains with respect to acts performed in the exercise of his functions as a member of the mission, even after he ceases to be a member. The only specific act attributed

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[3] The immunity may derive from a formal or informal convention whereby one sovereign agrees to permit another sovereign, including his/her designated representatives, to enter the former's territory for official government business without threat of being subject to judicial process. *The Schooner Exchange* v. *McFaddon*, 11 U.S. 74, 86-87 (7 Cranch 116) (1812). As discussed *infra*, head of state immunity, applicable to President Mubarak, derives from an informal ~~reciprocal~~ convention, while diplomatic immunity, applicable to Deputy Prime Minister Abu Ghazala, derives from the Vienna Convention on Diplomatic Relations.

to Abu Ghazala by the proposed complaint is an act performed in his capacity as defense attache. Proposed complaint at ¶ 25. Diplomatic immunity from a court's jurisdiction on account of such activity is patently appropriate.

Accordingly, the immunities for heads of state and their ministers and diplomats are available to protect President Mubarak and Deputy Prime Minister Abu Ghazala from a court's jurisdiction.

5. The Supreme Court has mandated that the courts of the United States are bound by suggestions of immunity, such as this, which are submitted to the courts by the Executive Branch. *Ex Parte Republic of Peru*, 318 U.S. 578, 588-89 (1942); *Republic of Mexico* v. *Hoffman*, 324 U.S. 30, 36 (1945). Thus, in *Peru*, *supra*, the Supreme Court, without further review of the Executive's determination, declared that the suggestion of immunity must be accepted by the Judiciary as a "conclusive determination by the political arm of the Government" that the continued retention of jurisdiction would jeopardize the conduct of foreign relations. 318 U.S. at 589; *see Spacil* v. *Crowe*, 489 F.2d 614, 617 (5th Cir. 1974). Accordingly, upon the filing of a suggestion of immunity such as this, it becomes the "[C]ourt's duty" to surrender jurisdiction for which immunity has been recognized. *Peru*, 318 U.S. at 588; *Hoffman*, 324 U.S. at 35.

6. That the courts of the United States are mindful of the Supreme Court's teachings with respect to Executive Branch suggestions of immunity is evidenced by such recent cases as *Estate of Silme G. Domingo* v. *Marcos*, No. C82-1055V (W.D. Wash. Dec. 23, 1982) (wrongful death action against Ferdinand and Imelda Marcos dismissed pursuant to suggestion of immunity by the United States) (copy of Order attached as Exhibit B); *Psinakis* v. *Marcos*, No. C-75-1725 (N.D. Cal. 1975) *result reported in* [1975] *Digest of United States Practice in International Law*, pp. 344-45 (libel action

against Ferdinand Marcos dismissed pursuant to suggestion of immunity). A suggestion of immunity has been recognized as precluding the exercise of a federal court's jurisdiction not only in matters involving heads of state but also with respect to senior officials and representatives of foreign governments in this country on official business. *Kilroy* v. *Windsor*, No. C 78-291 (N.D. Ohio Dec. 7, 1978) (civil rights conspiracy action against Prince of Wales dismissed upon suggestion of immunity) (copy attached as Exhibit C); *Chong Boom Kim* v. *Yim Hong Shik*, *supra*, (tort action against Foreign Minister of the Republic of Korea dismissed upon the suggestion of immunity).

7. This traditional and appropriate deference of the Judiciary to Executive Branch suggestions of immunity is predicated on "compelling" considerations arising out of the conduct of our foreign relations. *Spacil* v. *Crowe*, 489 F.2d at 619. Several reasons support the justification for this deference. First,

> [s]eparation-of-powers principles impel a reluctance in the judiciary to interfere with or embarrass the executive in its constitutional role as the nation's primary organ or international policy.

Ibid., citing *United States* v. *Lee*, 106 U.S. 196, 209 (1882); *Peru*, 318 U.S. at 588. Second, in comparison with the Executive's institutional resources and extensive experience in the day-to-day conduct of the country's foreign affairs, the Judiciary is ill-equipped to second-guess Department of State determinations which may affect such interests. *Spacil*, 489 F.2d at 619. Finally, as the Court of Appeals for the Fifth Circuit also observed in *Spacil*, "[p]erhaps more importantly, in the chess game that is diplomacy, only the executive has a view of the entire board and an understanding of the relationship between isolated moves." *Ibid.*

Acknowledgement of the immunity of these two individuals is particularly appropriate. The Government of

Egypt is entitled to certain privileges and immunities for these individuals based on the head of state and diplomatic immunity doctrines, and has requested that the United States Government assert these immunities. The acts alleged in the factual allegations of the proposed complaint are clearly covered by these doctrines.

8. The United States recognizes that in the usual bankruptcy proceeding where, as here, available defenses to a prospective suit render claims framed by the suit of inconsequential value to the debtor's estate, it would not be unusual for the debtor's application for abandonment to be granted under the authority of 11 U.S.C. § 554. This is not the usual case, however. While the United States would apply for, and confidently anticipate, the dismissal of President Mubarak and Deputy Prime Minister Abu Ghazala on immunity grounds if suit were ever filed in district court, the injury to United States foreign policy interests would have occurred.

The Egyptian Government, recognizing that its President and Deputy Prime Minister are immune from the jurisdiction of federal courts under the referenced legal principles, has requested the United States government to take immediately available steps to secure the protections afforded by these immunities. The United States is obligated by customary international law and applicable treaties to preserve the immunities of foreign heads of state and diplomatic representatives. The debtor's application presents such an opportunity to now raise and implement the immunity's shield. As the letter of the Legal Adviser of the Department of State indicates, the United States would vigorously insist that a foreign government intervene at the earliest possible moment under its domestic laws if the situation involved a United States government official under similar circumstances.

The instant suggestion of immunity effectively asks this Court to decline to permit the debtor to utilize the procedures and rules of this Court to undertake a useless

act harmful to United States foreign policy interests. While the immunity suggestion goes to issues beyond those customarily embraced by debtor-creditor litigation, it is no less justified. On the contrary, the obviously high public interest in a strong, unfettered foreign policy argues forcefully for recognizing head of state and diplomatic immunities as grounds for disallowing the application with respect to President Mubarak and Deputy Prime Minister Abu Ghazala. As the Supreme Court has recognized recently, the power of a bankruptcy court to order the trustee to abandon claims is limited by public policy considerations, and the court has the authority to deny an application even though the claim is of no value to the estate. Where public policy interests might be adversely affected, abandonment is improper and a request to abandon will be denied. *MidAtlantic Bank* v. *New Jersey*, 106 S.Ct. 755, 759 (1986). In short, it would not be an abuse of this Court's discretion under 11 U.S.C. § 554 to decline to order abandonment of a potential lawsuit that no one has a right to bring in the first place.[4]

Conclusion

For the foregoing reasons, the debtor's application for the trustee to abandon claims should be denied unless the claims are limited to exclude litigation against President Mubarak and Deputy Prime Minister Abu Ghazala.

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[4] Moreover, ordering abandonment could be adverse to the interests of the Internal Revenue Service, a creditor in this matter holding non-dischargeable claims. Pursuit of such an action against President Mubarak and Defense Minister Abu Ghazala would likely give rise to sanctions under Rule 11 of the Federal Rules of Civil Procedure, in favor of the Egyptian officials and add additional post-petition creditors with whom the IRS would have to compete in collecting from debtor's post-petition assets.

Respectfully submitted,

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EXHIBIT A

THE LEGAL ADVISER
DEPARTMENT OF STATE
WASHINGTON

July 30, 1987

Richard K. Willard, Esquire
Assistant Attorney General
Department of Justice
Washington, D.C. 20530

Dear Mr. Willard:

On June 18, 1987, an application was filed in the U.S. Bankruptcy Court for the Eastern District of Virginia entitled *In Re Edwin Paul Wilson*, Bankruptcy Case No. 84-01415. In the application, debtor applies for an order of abandonment of certain claims so that he can file a proposed civil lawsuit against several individuals, including President Mohammed Hosni Mubarak and Deputy Prime Minister and Defense Minister Mohammed Abu Ghazala.

President Mubarak is the sitting head of State of Egypt. Mohammed Abu Ghazala, the Deputy Prime Minister and Defense Minister of Egypt, was accredited as the defense attache of the Egyptian embassy to the United States at the time of the action attributed to him in the proposed complaint. The Government of Egypt is entitled to assert certain privileges and immunities based on head of State and diplomatic immunity doctrines and has formally requested that the United States Government suggest the immunity of the President and Deputy Prime Minister from such a suit. We believe that the acts alleged in the factual allegations of the complaint are covered by these doctrines. Accordingly, the Department of State requests that the Department of Justice submit to the bankruptcy court an appropriate

suggestion recognizing and allowing the immunity of President Mubarak and Deputy Prime Minister Abu Ghazala, and asking that the court not permit the referenced suit to go forward unless it deletes as defendants these two officials who enjoy immunity.

The Department of State attaches particular importance to obtaining a prompt decision by the Bankruptcy Court not to permit the filing of the proposed suit with respect to President Mubarak and Deputy Prime Minister Abu Ghazala in view of the significant foreign policy implications of such an action. A central purpose of the immunities involved in this matter is the interest in preventing improper suits against certain classes of foreign officials, to prevent harassment and interference with the performance of their duties. The United States supports these immunities, because respect for them is required by international law, but also because the United States would seek and would expect to have these immunities extended to its own officials under the same circumstances. The United States would also vigorously insist that any foreign government intervene at the earliest practicable moment under its domestic law.

Sincerely,

/s/ Abraham D. Sofaer
ABRAHAM D. SOFAER